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Eminent Domain in Montana Transmission/Wind Working Group August 4, 2011





Eminent Domain Overview

Eminent Domain has three parts:

- “Public Use”
- Due Process
- Just Compensation



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What does the law say?

70-30-101. Eminent domain defined. Eminent domain is the right of the state to take private property for public use. This right may be exercised in the manner provided in this chapter.

70-30-102. Public uses enumerated. Subject to the provisions of this chapter, the right of eminent domain may be exercised for the following public uses:



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What does 70-30-102 say?

70-30-102. Public uses enumerated. Subject to the provisions of this chapter, the right of eminent domain may be exercised for the following public uses:

- (1) all public uses authorized by the government of the United States;
- (2) public buildings and grounds for the use of the state and all other public uses authorized by the legislature of the state;
- (3) public buildings and grounds for the use of any county, city, town, or school district;
- (4) canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of any county, city, or town;
- (5) projects to raise the banks of streams, remove obstructions from streambanks, and widen, deepen, or straighten stream channels;
- (6) water and water supply systems as provided in Title 7, chapter 13, part 44;
- (7) roads, streets, alleys, controlled-access facilities, and other publicly owned buildings and facilities for the benefit of a county, city, or town or the inhabitants of a county, city, or town;
- (8) acquisition of road-building material as provided in [7-14-2123](#);
- (9) stock lanes as provided in [7-14-2621](#);
- (10) parking areas as provided in [7-14-4501](#) and [7-14-4622](#);
- (11) airport purposes as provided in [7-14-4801](#), [67-2-301](#), [67-7-210](#), and Title 67, chapters 10 and 11;
- (12) urban renewal projects as provided in Title 7, chapter 15, parts 42 and 43, except that private property may be acquired for urban renewal through eminent domain only if the property is determined to be a blighted area, as defined in [7-15-4206\(2\)\(a\)](#), [\(2\)\(h\)](#), [\(2\)\(k\)](#), or [\(2\)\(n\)](#), and may not be acquired for urban renewal through eminent domain if the purpose of the project is to increase government tax revenue;
- (13) housing authority purposes as provided in Title 7, chapter 15, part 44;
- (14) county recreational and cultural purposes as provided in [7-16-2105](#);
- (15) city or town athletic fields and civic stadiums as provided in [7-16-4106](#);
- (16) county cemetery purposes pursuant to [7-11-1021](#), cemetery association purposes as provided in [35-20-104](#), and state veterans' cemetery purposes as provided in [10-2-604](#);
- (17) preservation of historical or archaeological sites as provided in [23-1-102](#) and [87-1-209\(2\)](#);
- (18) public assistance purposes as provided in [53-2-201](#);
- (19) highway purposes as provided in [60-4-103](#) and [60-4-104](#);
- (20) common carrier pipelines as provided in [69-13-104](#);
- (21) water supply, water transportation, and water treatment systems as provided in [75-6-313](#);
- (22) mitigation of the release or threatened release of a hazardous or deleterious substance as provided in [75-10-720](#);
- (23) the acquisition of nonconforming outdoor advertising as provided in [75-15-123](#);
- (24) screening for or the relocation or removal of junkyards, motor vehicle wrecking facilities, garbage dumps, and sanitary landfills as provided in [75-15-223](#);



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70-30-102 (continued)

- (25) water conservation and flood control projects as provided in [76-5-1108](#);
- (26) acquisition of natural areas as provided in [76-12-108](#);
- (27) acquisition of water rights for the natural flow of water as provided in [85-1-204](#);
- (28) property and water rights necessary for waterworks as provided in [85-1-209](#) and [85-7-1904](#);
- (29) conservancy district purposes as provided in [85-9-410](#);
- (30) wharves, docks, piers, chutes, booms, ferries, bridges, private roads, plank and turnpike roads, and railroads;
- (31) canals, ditches, flumes, aqueducts, and pipes for:
 - (a) supplying mines, mills, and smelters for the reduction of ores;
 - (b) supplying farming neighborhoods with water and drainage;
 - (c) reclaiming lands; and
 - (d) floating logs and lumber on streams that are not navigable;
- (32) sites for reservoirs necessary for collecting and storing water. However, reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.
- (33) roads, tunnels, and dumping places for working mines, mills, or smelters for the reduction of ores;
- (34) outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills, and smelters for the reduction of ores;
- (35) an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores and sites for reservoirs necessary for collecting and storing water for the mines, mills, or smelters. However, the reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.
- (36) private roads leading from highways to residences or farms;

(37) telephone or **electrical energy lines**, except that local government entities as defined in [2-7-501](#), municipal utilities, or competitive electricity suppliers may not use this chapter to acquire existing telephone or electrical energy lines and appurtenant facilities owned by a public utility or cooperative for the purpose of transmitting or distributing electricity or providing telecommunications services;

- (38) telegraph lines;
- (39) sewerage of any:
 - (a) county, city, or town or any subdivision of a county, city, or town, whether incorporated or unincorporated;
 - (b) settlement consisting of not less than 10 families; or
 - (c) public buildings belonging to the state or to any college or university;
- (40) tramway lines;
- (41) logging railways;
- (42) temporary logging roads and banking grounds for the transportation of logs and timber products to public streams, lakes, mills, railroads, or highways for a time that the court or judge may determine. However, the grounds of state institutions may not be used for this purpose.
- (43) underground reservoirs suitable for storage of natural gas;
- (44) projects to mine and extract ores, metals, or minerals owned by the condemnor located beneath or upon the surface of property where the title to the surface vests in others. However, the use of the surface of property for strip mining or open-pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use, and eminent domain may not be exercised for this purpose.
- (45) projects to restore and reclaim lands that were strip mined or underground mined for coal and not reclaimed in accordance with Title 82, chapter 4, part 2, and to abate or control adverse effects of strip or underground mining on those lands.



What is “Public Use”?

Montana Supreme Court cases:

- “. . . A public use is one which confers some benefit or advantage to the public whether exercised by one or many members of the public, a “public advantage” or “public benefit” accrues.” Montana Power v Bokma (1969)
- “The power of eminent domain is vested exclusively in the legislature.” Montana v Crossen-Nissen Company (1965)



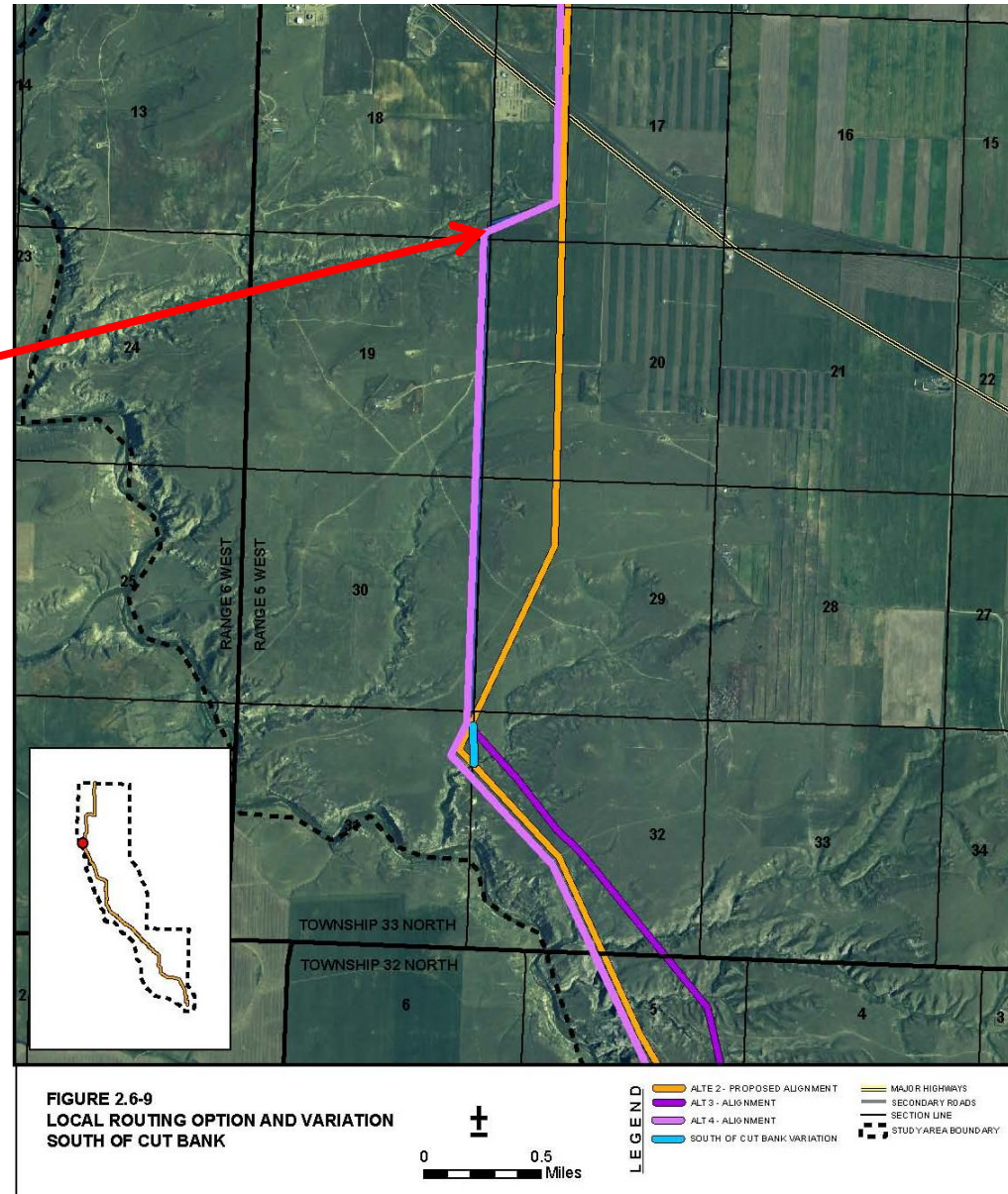
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Salois Case

Tipi rings





District Court Ruling

In Glacier County in December 2010 . . .

- Landowner attorney argues that a private, foreign corporation does not possess condemnation authority – reserved to the state.
- Judge McKinnon agrees, stating that she could not find an enabling statute (expressed or implied) that confers the state's authority onto a private entity.



Look back at 45 “public uses” . . .

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Approached Legislature to Clarify the Law

HB 198 says eminent domain may be exercised by an entity providing the “public use” already defined in 70-30-102 if they are:

- 1- a public utility (regulated by PSC), or**
- 2- a merchant line (regulated by FERC), which has obtained a MFSA Certificate.**



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What did HB 198 change in 70-30?

Nothing.

“Public use” is clarified in response to Judge McKinnon’s decision

Due process remains unchanged

Just compensation remains unchanged



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What is Due Process in this context?

Notice and Hearing

Formal MFSA and MEPA processes which provide significant opportunity for public input and regulatory review of the project.

- **Purpose and Need**
- **Basis of the need for the facility**
- **That the facility will serve the public interest, convenience and necessity**



What process did MATL follow?

2005 – 2008 MFSA and MEPA processes providing extensive public engagement

Project developer is responsible for negotiating land acquisition with landowners. MATL has formal, documented process including:

- **An up-front appraisal**
- **A minimum of three offers**
- **Alternative dispute resolution**



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What is Just Compensation?

No statutory definition.

In the case of MATL:

- **Tax abatement based on 2007 legislation**
- **>100% of appraised fee value**
- **Three-years of crop damage payments**
- **Annual “pole” payments for life of project**



Current Status

Marias North Segment:

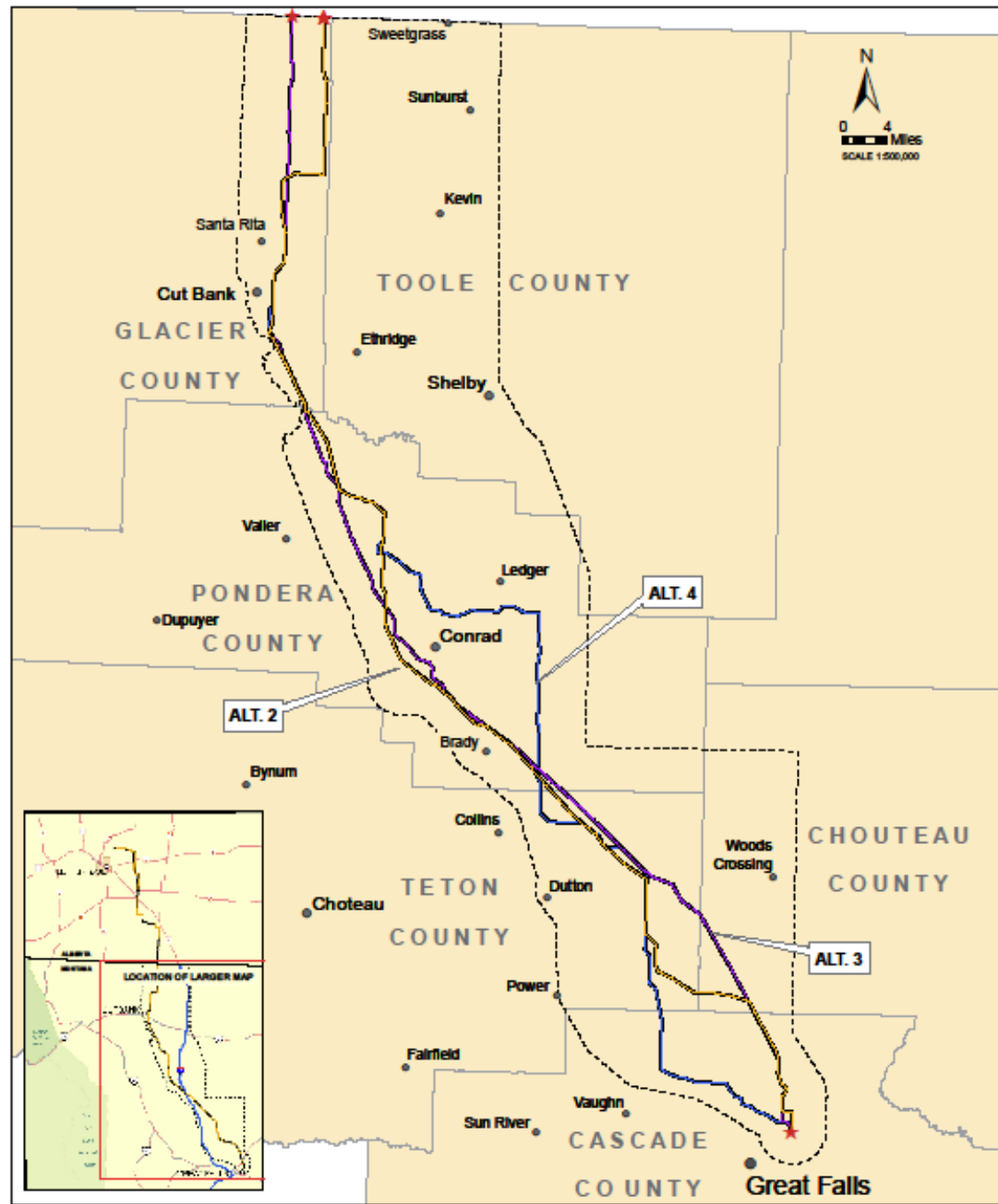
One landowner in over 100 that refuses to negotiate

Marias South Segment:

Over 35 landowners in 200 that refuse to negotiate

35 to 40 landowners involved in condemnation (25+ represented by one attorney)

Project stalled – wind farm stalled – all told nearly \$1billion investment on hold.





What are the issues?

Alignment, structure type, structure location

- continue to work with landowners

Easement language

- requesting review by Western Area Power Administration

Compensation

- individually negotiated based on appraisal
- attempting to maintain equity across all landowners



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Lessons Learned:



What to do:

- Proactive, regular landowner updates (newsletter and community meetings)
- Direct line of communication
- Actively manage the process

What not to do:

- Opt out of MFSA – you need this process
- Be too aggressive in project timelines
- Resist short-term setbacks that may help in long run

